UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

WYMAN GORDON PENNSYLVANIA, LLC	:	
	:	
	:	
AND	:	CASES 04-CA-182126,
	:	04-CA-186281, and
UNITED STEEL, PAPER AND FORESTRY,	:	04-CA-188990
RUBBER, MANUFACTURING, ENERGY,	:	
ALLIED-INDUSTRIAL AND SERVICE	:	
WORKERS INTERNATIONAL UNION,	:	
AFL-CIO/CLC	:	
	:	

RESPONDENT'S OPPOSITION TO THE UNION AND GENERAL COUNSEL'S MOTIONS TO STRIKE PORTIONS OF RESPONDENT'S BRIEF AND EXHIBITS

I. INTRODUCTION

Respondent Wyman Gordon Pennsylvania, LLC ("Employer" or "Wyman Gordon"), by and through its undersigned counsel, hereby files this Opposition to the Union's Motion To Strike Portions of Respondent's Brief and Exhibits Not Admitted and to the General Counsel's Motion to Strike Attachments and References Thereto from Respondent's Brief to the Administrative Law Judge (the "Motions").

The Union and General Counsel seek to strike Exhibit A, the Regional Director's March 1, 2017 Decision to Partially Dismiss Case No. 04-CA-188990 addressed to Union counsel Nathan Kilbert; and Exhibit B, the Regional Director's October 31, 2016 approval of the Charging Party's request to withdraw portions of Case No. 04-CA-182126, addressed to Employer counsel Rick Grimaldi and copying Mr. Kilbert, and any reference thereto in the Employer's brief. Additionally, the General Counsel seeks to strike the true and correct copy of Employer Exhibit 3 attached to its brief with page numbers added. For the foregoing reasons, the Motions should be denied.

II. ARGUMENT

A. Exhibits A and B

The Union and General Counsel's requests to strike Exhibits A and B of the Employer's post-hearing brief, and any arguments referencing same, are without merit. The Union and General Counsel inexplicably attempt to exclude prior findings of the Regional Director which frame the issues before Your Honor in this case. To be clear, the Employer is not arguing *res judicata*; rather, the Employer is merely attempting to clarify which issues are before Your Honor. The exhibits and any arguments relying on same should not be stricken for the following reasons: 1) Your Honor may take judicial notice of the documents; 2) there is no prejudice; and 3) portions of these documents have been referenced throughout these proceedings without objection.

1. Judicial Notice

Federal Rule of Evidence 201 provides that a court may judicially notice a fact that is not subject to reasonable dispute because it: 1) is generally known within the trial court's territorial jurisdiction; or 2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Ev. 201.

It is well established that the Board takes judicial notice of its prior proceedings. *See The Baldwin Locomotive Works,* 80 NLRB 403 at n. 2 (1950) ("As the Board takes judicial notice of its prior proceedings..."); *Tin Processing Corporation,* 80 NLRB 1369 (1948) (denying motion to incorporate as part of the record a number of Board proceedings involving the employees of the Employer for purposes of showing the history of collective bargaining: "Since the Board takes judicial notice of prior proceedings before it, there is no necessity to incorporate such prior proceedings to establish the fact of bargaining history."). Accordingly, the prior proceedings in

this matter, including what has and has not been withdrawn and dismissed, can and should be judicially noticed.

In any event, it is appropriate to take judicial notice of the *fact* that the Regional Director made these determinations, if not the truth of the information therein. *See Rivas v. Fischer*, 687 F.3d 514, 520 (2d Cir. 2012) (taking judicial notice that press coverage contained certain information, without regard to the truth of its contents). Regardless of whether the Union or General Counsel agree with the Regional Director's prior decisions, it is undisputed that these were in fact his decisions, and the allegations therein are not at issue in this case. Accordingly, judicial notice is proper. *McCrary v. Elations Co., LLC*, No. EDCV 13-00242 JGB OP, 2014 WL 1779243, at *1 (C.D. Cal. Jan. 13, 2014) (taking judicial notice of judicial opinions, which "are not subject to reasonable dispute"). The dismissals and withdrawals noted in Exhibits A and B unequivocally illustrate which allegations remain in this matter. Despite the General Counsel's repeated attempts to resurrect these allegations, Exhibits A and B demonstrate the fact that certain allegations are not at issue. This is appropriate for judicial notice.

The cases cited by the General Counsel/Union are inapposite. The appended decisions by the Regional Director merely clarify the claims (consistent with the Employer's prehearing motion on the same issue) and provide context for the matters for Your Honor. (Employer's brief specifically states, "There are various issues that have been decided by the Regional Director which are not before Your Honor, but which *nevertheless provide important context in this case*." (Emphasis supplied.)) Based on one of the decisions cited by the General Counsel/Union, *G.M. Masonry*, 245 NLRB 54 (1979), this is appropriate. *G.M. Masonry*, at FN 7 ("The foregoing recital is mentioned here for the sole purpose of providing an understanding of the history of this case.")[1]

[1] Tellingly, both the Union and General Counsel omit relevant portions of the footnote cited to support their position, instead relying on partial quotes and ellipses in what appears to be an

Moreover, the Board acknowledged, in *Walter B. Cooke, Inc.*, 262 NLRB 74 (1982), also relied upon by the General Counsel, that it was appropriate for the Board to consider a prior dismissal letter insofar as it contained factual evidence. (discussing *APA Transport Corp.*, 239 NLRB 1407 (1979).

The General Counsel and Union seem to misconstrue the issue here: the General Counsel repeatedly stated on the record that the matters before Your Honor are limited to those allegations contained within the Amended Consolidated Complaint. (Tr. 559:13-16) (responding "correct" when Your Honor asked, "But you're not alleging that they violated the Act in any respect with regard to anything that's not specifically mentioned in the complaint?") (*See also* Tr. 113:14-25; 114:1-2; 118:25; 119:1; 251:3-5; 494:22-25; 496:23-25; 499:4-8). Unlike the cases cited by the General Counsel and the Union, there is no allegation that the charges that were dismissed or withdrawn were subsequently refiled within the six-month period prescribed in the Act. Yet, they cite *GCC Beverages, Inc., d/b/a Pepsi-Cola Bottlers of Atlanta*, 267 NLRB 182 (1983), for the proposition that "a prior charge which is dismissed does not constitute an adjudication on the merits and no *res judicata* effect can be given to the action," (citing *Walter B. Cooke, Inc.*¸ 262 NLRB 626 (1982)), without providing the important fact that *GCC Beverages* deals with whether a charge withdrawn by a party may be reinstated beyond the six-month period prescribed in the Act. Insofar as there is no allegation that any of the dismissed or withdrawn charges were timely refiled, those matters are not before Your Honor. The Regional Director's letters simply clarify which allegations remain at issue.

effort to manipulate its meaning. Both parties cite that a Regional Director's dismissal "does not constitute evidence" and is "not binding in any other respect," without noting in what respect the dismissal was binding, which was to provide an understanding of the history of the case."

The General Counsel likewise cites *Tramont Manufacturing*, LLC, 365 NLRB No. 59, slip op. at 8 (2017) for the proposition that a determination from the Office of Appeals does not have any preclusive effect. However, neither of the Exhibits at issue are determination from the Office of Appeals, nor is the Employer arguing *res judicata.* Rather, the Employer is clarifying the history of this case so that it can be understood what is and is not at issue.

Similarly, the General Counsel misapplies *S.H. Kress & Co.*, 212 NLRB 132 (1974) to this case. In that case, the Hearing Officer took judicial notice of the fact that the petitioning union was a labor organization based upon its involvement in a prior case dismissed by the Regional Director (and involving a different employer). Therefore, the Board appropriately clarified that it was not attaching any precedential value to the Regional Director's determination, but rather taking judicial notice of the fact that the union was involved in another matter. *S.H. Kress & Co.*, 212 NLRB 132, n. 1. *S.H. Kress & Co.* actually ***supports*** the Employer's position, as the Employer is not citing the Exhibits as legal precedent, but instead to illustrate the factual history of this case, including the fact that specific claims have been dismissed.

Finally, there is no dispute that Exhibits A and B are indeed exactly what they purport to be: decisions from the Regional Director related to the charges at issue in this case. The Union received these documents at the same time the Employer did and it cannot reasonably dispute the authenticity of the documents. The source—the Regional Director and the same agency under which this matter is pending—cannot be questioned. Consequently, the Exhibits are appropriate for judicial notice. The Motions must therefore be denied.

2. <u>There is No Prejudice</u>

Notably, there is no prejudice to the Union or General Counsel if the Exhibits are included in the Employer's brief. Exhibit A was indeed addressed to Mr. Kilbert, the Union's counsel.

Similarly, Mr. Kilbert was copied on Exhibit B. These documents contain no surprises and, as explained more fully below, have been referenced throughout this proceeding. Therefore, there is no prejudice to any party by including them despite not being exhibits admitted during the hearing.

Conversely, the Exhibits are critically relevant to this matter, which outweighs any alleged prejudice to the Union or General Counsel. The Exhibits are illustrative of the parties' bargaining history. This is indeed relevant, as many of the Union and General Counsel's arguments relate to those charges previously dismissed and not at issue in the Amended Consolidated Complaint. The parties spent a significant amount of time discussing the allegations actually at issue, including during a pre-hearing telephone conference with Your Honor, and again at the opening of the hearing. The Employer filed a motion to strike portions of the Amended Consolidated Complaint based on this very issue. It is therefore imperative that the record include the procedural history of these charges.

Additionally, whether the alleged unfair labor practices at issue tainted the withdrawal cannot be looked at in a vacuum, but must be examined by looking at the entirety of the parties' negotiations. Therefore, the parties' bargaining history, including the determinations made prior to the issuance of the Amended Consolidated Complaint, are relevant. *See APA Transport Corp.*, 239 NLRB 1407 (1979) (Board considered prior dismissal letter insofar as it contained factual evidence for summary judgment purposes). In sum, there simply is no prejudice to the Union or General Counsel in including the Exhibits in the Employer's brief. To the extent the parties argue otherwise, any prejudice is far outweighed by the relevance of the Exhibits. The Motions should therefore be denied.

3. The Exhibits Have Been Referenced Throughout These Proceedings without Objection

The exhibits at issue have been referenced throughout these proceedings without objection from any party. Accordingly, the Union and General Counsel have waived any right to object now.

In the Employer's March 19, 2018 Motion to Strike Paragraphs 7, 8 and 10 of the Amended Consolidated Complaint, the Employer included reference to, and large passages from, Exhibits A and B. (*See* Employer's Motion to Strike Paragraphs 7, 8 and 10 in the Amended Consolidated Complaint at Section IV(A), providing the *entirety* of Exhibit B; and Section IV(C), including substantial portions of Exhibit A). Neither the Union nor General Counsel made mention of such references at that time, nor was it objected to in the General Counsel's opposition to the Employer's motion. Tellingly, the Union filed nothing with regard to the Employer's inclusion of the procedural history of the charges at issue when moving to strike portions of the Amended Consolidated Complaint.

Further, the Employer read from or referenced Exhibit A during the hearing in this matter, again without objection from any party. (Tr. 27:13-21; 60:10-25; 305:3-11; 378:8-15). Not once did the Union or General Counsel object to reference to the Regional Director's decisions on the record, nor did they dispute that multiple allegations made by the Union prior to the issuance of the Amended Consolidated Complaint were in fact dismissed. The procedural history has been relevant and discussed repeatedly throughout these proceedings without objection from the Union or General Counsel. Consequently, they have waived any argument to object to reference to the Exhibits now.

B. Employer Exhibit 3 with Page Numbers

The General Counsel also objects to the true and correct copy (as noted in Employer's brief) of Employer Exhibit 3 with page numbers added. As explained in the Employer's brief, this was done as a convenience for Your Honor, and all parties, to facilitate finding the page the Employer is referencing. Employer Exhibit 3 is a 171-page document that, as pointed out by the General Counsel, is cited throughout the Employer's brief. Rather than ask Your Honor to search 171 pages each time he needs to reference a citation, the Employer added page numbers for ease of reference. The Employer fails to see the difference between directing Your Honor to, for example, turn to the 23rd page of the document versus providing page numbers and directing him to page 23. No "facts" are added to the record by including this document. Such a petty and frivolous motion is consistent with the General Counsel's conduct throughout these proceedings.

Further, even if the exhibit is stricken from the Employer's brief, striking citations thereto is improper. The citations included in the Employer's brief are to an admitted evidentiary document merely with page numbers added. At most, the reference to specific page numbers would be stricken, but certainly not the reference to the admitted document itself. The General Counsel's request here is, candidly, beyond the pale. Nevertheless, should Your Honor decide that the addition of the page numbers is in any way problematic, Employer respectfully requests that Your Honor use Employer Exhibit 3 from the record instead.

The General Counsel's allegation that the Employer substantively altered Employer Exhibit 3 is meritless. As made clear in its brief, page numbers—and only page numbers—were added for convenience. Accordingly, the General Counsel's request must be denied. In the alternative, Employer requests that references in the Employer's brief to Exhibit 3 be understood to reference the Court Reporter's Exhibit 3.

III. CONCLUSION

For the foregoing reasons, the Union and General Counsel's Motions should be denied. Exhibits A and B are records of prior proceedings which provide appropriate clarification of the claims at issue in this matter and are, therefore, proper for judicial notice, do not prejudice any party, and any objection to same has been waived. Similarly, the General Counsel's objection to a courtesy copy of an admitted exhibit adding page numbers is baseless. Accordingly, the Employer respectfully requests that the Motions be denied.

Dated: June 29, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of June, 2018, I e-filed the foregoing **RESPONDENT'S OPPOSITION TO THE UNION and GENERAL COUNSEL'S MOTIONS TO STRIKE PORTIONS OF RESPONDENT'S BRIEF AND EXHIBITS** with the Division of Judges, and served a copy of the foregoing document via e-mail to all parties in interest, as listed below:

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